

PROPOSED REVISIONS TO THE RULES OF EVIDENCE

The Rules of Evidence Committee is considering whether to recommend proposed amendments to the Rules of Evidence for the Supreme Court's consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before October 4, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

11-804. Hearsay exceptions; declarant unavailable.

A. **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement;

or

- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under Subparagraphs (2), (3) or (4) of Paragraph B, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

B. **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

(2) **Statement under belief of impending death.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) **Statement against interest.** ~~[A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.]~~ A statement against interest that

(a) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(b) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) **Statement of personal or family history.**

(a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or

(b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[As amended, effective April, 1, 1976; December 1, 1993; January 1, 1995; as amended by Supreme Court Order 07-8300-23, effective November 1, 2007; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Paragraph B(1) was changed in 1976 to conform to the federal rule. The rule now narrows the exception for the use of former testimony in a criminal case by only admitting the testimony if the party against whom it is offered was a party in the prior proceeding.

Paragraph B(4) was changed to conform to federal rule. However, the federal rule is codified as Paragraph B(3) because congress deleted the exception for a statement of recent perception, included in New Mexico as Paragraph B(2). The rule now eliminates the exception for statements that tend to make the declarant an object of hatred, ridicule or disgrace. The amendment also adds the requirement that a statement tending to expose the declarant to criminal liability, if offered to exculpate the accused, must have corroborating circumstances clearly indicating the trustworthiness of the statement.

Paragraph B(6) was changed in 1976 to conform to federal rule. This rule is identical to amended Rule 11-803. *See* commentary to 11-803, *supra*. (*See* 2007 committee commentary for an explanation of why this paragraph has been deleted.)

2007 Committee commentary.—Eliminating the identical “catch-all” exception in Subparagraph (5) of Paragraph B of this rule and Paragraph X of Rule 11-803 NMRA and combining them in new rule 11-807 NMRA, with no intended change in meaning, tracks the 2000 amendments to the corresponding federal rules.

The new exception added to Subparagraph (5) of Paragraph B is taken verbatim from federal rule 804(b)(6), which was adopted in 1997, and reflects a substantial body of state and federal case law. *See, e.g., State v. Romero*, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694; *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699 (2004). It would lessen a party’s ability to benefit from intentionally making a witness unavailable.

2010 Committee commentary.—Paragraph (B)(3) was amended in 2010 to be consistent with amendments to federal rule 804(b)(3), due to go into effect on December 1, 2010. These amendments require the state to show corroborating circumstances as a condition for admission of an unavailable declarant’s statement against penal interest. The current rule requires only the defendant to make such a showing. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under this exception.

[As amended by Supreme Court Order No. _____, effective _____.]